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No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1957

ACY LENNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1957; and a petition for rehearing was denied on July 12, 1957. (Pet. 11a.) The petition for a writ of certiorari was filed on August 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was deprived of a fair trial by testimony tending to show receipt of unreported income which was later stricken by the trial court for lack of connection with petitioner.

2. Whether, where the indictment charged a willful attempt to evade and defeat taxes by filing fraudulent returns which understated income and listed false exemptions, the petitioner was entitled to a special verdict indicating in which of the two respects charged the returns were false, or in the alternative to an instruction that there must be unanimous agreement that they were false in one or both respects.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Federal Rules of Criminal Procedure:

RULE 31. VERDICT.

(a) *Return.*—The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

* * * * * *

STATEMENT

On September 27, 1955, a five count indictment was filed against the petitioner in the United States District Court for the Southern District of New York charging that he willfully attempted to evade and defeat a large portion of his income taxes for the years 1949 through 1952, and his and his wife's taxes for the year 1953, by filing fraudulent returns in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1a-6a.)[1] On July 2, 1956, a second indictment was returned by another grand jury which duplicated the first indictment except that an additional item of unreported income was added to the fifth count and a sixth count was added charging attempted evasion of joint income taxes for the year 1954. (R. 1a, 7a-10a.) On August 21, 1956, the two indictments were consolidated by order of Judge Edmund L. Palmieri. (R. 2a.)

[1] The record consists of the Appendices to the briefs in the Court of Appeals. The appellant's Appendix is designated herein as "R." The Government's Appendix is designated "Supp. R."

The consolidated indictment charged that the amounts of net income and tax liability reported in the returns and corrected were as follows (R. 11a-14a, 184a, 188a):

	Reported		Corrected	
	Net Income	Tax	Net Income	Tax
Count I (1949)	$3,091.25	$ -0-	$4,691.25	$ 388.69
Count II (1950)	3,586.20	-0-	5,286.20	525.41
Count III (1951)	3,159.40	-0-	4,759.40	488.50
Count IV (1952)	2,657.63	-0-	4,157.63	390.19
Count V (1953)	3,772.32	304.66	7,357.82	1,123.62
Count VI (1954)	4,986.40	1,047.00	6,247.90	1,294.54

Counts one through five charged that, in addition to understating income, petitioner also falsely listed two dependents as exemptions. (R. 11a-14a.) Trial began on October 4, 1956. (R. 2a, 21a.) On October 19, 1956, the jury returned a verdict of guilty on Counts One through Four, not guilty on Count Five and reported that it was unable to reach a verdict on Count Six. (R. 210a-211a.) Petitioner was subsequently sentenced to imprisonment for a year and a day on each of the first four counts, sentences to run concurrently, and fined a total of $2,000. (R. 221a.) The evidence to support the verdict may be summarized as follows.

Petitioner is a married man, who has two daughters, Vivian Della and Barbara. (R. 44a, 74a.) During the prosecution years he was employed as a secretary by Congressman Adam Powell, Jr., of New York (Supp. R. 84a) and as the director of boys' activities of the Abyssinian Baptist Church in New York City, where Dr. Powell served as minister (Supp. R. 83a, 98a). From 1941 until sometime in 1951 he was also employed as a bookkeeper in a tax service operated by Joseph Ford at the Abyssinian Church. (R. 32a-33a.) Though he received $1,600 in 1949, $1,700 in 1950 and $1,600 in 1951 from Mr. Ford for his services as a bookkeeper

(R. 35a-40a; petitioner failed to report any income from this source.[2] In each of the returns for 1949 through 1952 petitioner claimed two non-existent dependent children, Acy, Jr. and William, whom he identified as sons, in addition to his daughters. (R. 41a-44a, 74a-76a, 78a; Supp. R. 161a-167a.)

The Government also alleged that in 1952 petitioner had $1,500 in commission income from the sale of apartments in a cooperative apartment project, which he did not report but concealed by using a non-profit organization as a conduit for handling the funds. Testimony relating to these commissions was received subject to connection but later stricken on the ground that the Government had failed to connect them with the petitioner (R. 135a-138a), and the jury was twice instructed that the issue of unreported commission income had been withdrawn and was not to be considered by it (R. 181a; Pet. 16).

ARGUMENT

1. Petitioner first contends that he was prejudiced by testimony indicating that improprieties may have been committed by Dr. Powell and others in connection with the sale of apartments in a cooperative apartment building. (Pet. 23.) The testimony to which he objects was introduced under the following circumstances:

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[2] Petitioner reported only his church and congressional salaries and the following miscellaneous items: 1949, $280 from the "Citizens Comm." and $367.71 from "Telephone & Commissions"; 1950, $132 from "Concession Telephone" and $160 from "Rebate from ice cream"; 1952, $1,280 from "Commissions, Publications, etc." He claimed a loss of $1,583.48 in 1949 and $1,321.44 in 1950 from the operation of a stationery store, a loss of $1,712.50 in 1951 from a confectionery business and a loss of $2,713.42 in 1952 from a stationery and candy store. (Supp. R. 161a-467a.)

The Government sought to prove that in 1952 petitioner had $1,500 in unreported commission income from the sale of apartments in a cooperative apartment house project being built and promoted by one David Kent, which income he attempted to conceal by using the Tenants Protective Association, Inc., as a conduit for handling the funds.[3] (R. 135a-136a.) This association was a non-profit corporation organized and headed by Dr. Powell to assist tenants in the Harlem area of New York City. (Supp. R. 85a, 117a-118a.) The Government's evidence, which was received subject to connection, tended to show that petitioner and one William Hampton (another employee of Dr. Powell) were engaged by Kent to sell the apartments. (Supp. R. 15a-18a.) The evidence showed that the Association received a check in the amount of $3,000 as the commission on the sale of 200 apartments sold by petitioner and Hampton (Supp. R. 7a-8a, 11a-12a); that the check was deposited in the Association's bank account on July 11, 1952 (Supp. R. 67a-71a); and that on July 17, 1952, this sum was withdrawn and used to purchase a cashier's check payable to Paul Klein (Supp. R. 63a-66a; 171a).[4] In an effort to show that the commissions from the sales were petitioner's and Hampton's rather than the Association's, and that they used them in making a personal loan to Klein, the

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[3] It is well settled that tax liability on income which is in a taxpayer's use and control cannot be defeated by placing bare title in another. *Higgins v. Smith*, 308 U. S. 473; *Greenwood v. Helvering*, 293 U. S. 465; *Corliss v. Bowers*, 281 U. S. 376.

[4] The check used to purchase the cashier's check had been stolen or destroyed. (Supp. R. 94a-96a, 113a-115a.) All officers of the Association authorized to sign checks except Dr. Powell, testified that they had not signed it. (Supp. R. 76a-81a.) Dr. Powell testified that he did not recall if he had signed such a check or not. (Supp. R. 101a.)

Government called Mr. Klein and Dr. Powell. (Supp. R. 6a, 19a, 85a-86a.)

Despite efforts to refresh Mr. Klein's memory with a statement he had given to an investigating agent and his testimony before the grand jury (Supp. R. 21a, 34a-51a, 169a), he testified that he had no recollection of receiving the money or any circumstances surrounding it (Supp. R. 20a, 31a-32a, 57a). Dr. Powell testified that the apartments were sold by petitioner and Hampton as well as other members of his staff for the Association which received the $3,000 from Kent as a donation for handling the sales, and that the Association had become inactive the money was given to Klein for work done in the past in behalf of various causes with which he (Powell) was connected. (Supp. R. 85a-91a.)

Upon petitioner's motion, this testimony and all other evidence relating to the receipt and disposition of the commissions was stricken on the grounds that there was no evidence that petitioner received any part of them. (R. 135a-138a.) The trial court thereupon instructed the jury that the issue of unreported commission income was removed from the case and was to be disregarded. (Pet. 16.) Again in the charge to the jury, in which the evidence as to each count in the indictment was discussed in considerable detail (R. 172a-196a), the trial court instructed the jury that the issue of unreported commission income for 1952 had been withdrawn and the only question for consideration as to that year was whether false exemptions had been claimed (R. 181a).

Though his motion to strike was granted and he did not move for a mistrial (Pet. 30), petitioner now urges that testimony with regard to "improprieties which

may have been committed by Congressman Powell and others, created an atmosphere prejudicial to him (Pet. 23). This contention is without merit. As indicated, the testimony complained of was introduced to show an alleged item of unreported income in the 1952 return and was therefore clearly relevant (See *Kelly[illegible]son* v. *United States*, 318 U.S. 189, 195-196; rehearing denied, 318 U.S. 801.) It is well settled that evidence otherwise relevant is not inadmissible though it exposes the defendant to odium or indicates the possible commission of crimes other than those charged. *United States* v. *Caserta*, 199 F. 2d 905 (C.A. 3d); *United States* v. *Crowe*, 188 F. 2d 209 (C.A. 7th); *Smith* v. *United States*, 236 F. 2d 260 (C.A. 8th); certiorari denied, 352 U.S. 909; *Schwartz* v. *United States*, 160 F. 2d 718 (C.A. 9th).

Contrary to petitioner's contention (Pet. 27), the Government had adequate reason to believe that it could be shown that the commission income was income to petitioner and Hampton rather than the Association. Unlike his testimony at trial, Kent, the promoter of the apartment project, when questioned before trial by the Federal Bureau of Investigation and a United States Senate Committee concerning the sale of the apartments, did not mention the Tenants Protective Association but spoke only of dealing with petitioner and Hampton. (Supp. R. 16a-17a.) Moreover, Klein had testified before the grand jury and given a statement during the investigation that upon Dr. Powell's recommendation he had been loaned $3,000 by petitioner and Hampton which had been on deposit in the Association's account. (Supp. R. 21a, 34a-40a, 169a.) Had he repeated these statements at trial the jury could have reasonably concluded that the Tenants Pro-

tective Association was merely being used by petitioner and Hampton to conceal receipt of income which they used for their own purposes.

Similarly, petitioner's contention (Pet. 31) that he was prejudiced by a question directed to Dr. Powell for the purpose of determining if he (Powell) had been subjected to any political pressure in regard to the case is without merit.[5] The trial court immediately sustained petitioner's objection to the question before a reply was given and twice instructed the jury that politics should not be considered in weighing the evidence. (R. 173a; Supp. R. 84a.) As the Court of Appeals points out (Pet. 10a), despite petitioner's objection to the Government's question his counsel proceeded to question Dr. Powell extensively as to whether anyone from the Government had even attempted to talk to him about the case. (Supp. R. 118a.) Moreover, petitioner's counsel had previously questioned Government witness Ford concerning his political rivalry with Dr. Powell. (R. 112a-113a.) We submit that if, as petitioner alleges, political considerations were, to any extent, injected into the trial, they were injected by the questioning of his own counsel.

2. Petitioner next urges that he was entitled to a special verdict requiring a finding as to whether he willfully omitted a portion of his income and/or listed false exemptions as to each year, or in the alternative to an instruction that there must be unanimous agreement as to the manner in which each return was false, and that the trial court's failure so to instruct induced

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[5] Shortly after he took the stand Dr. Powell was asked, "Now Dr. Powell, has any pressure in any manner, shape or form, directly or indirectly, been put on you by the White House or anybody in the United States Government in connection with this case?" (R. 131a; Supp. R. 84a.)

a compromised verdict. (Pet. 35-43.) The novelty of this contention aside, it ignores the nature of the verdict in a criminal case and the crime with which petitioner was charged.

As this Court stated in *Andres* v. *United States*, 333 U.S. 740, 748, "A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." Here the crime charged was the willful attempt to evade taxes in any manner, defined by Section 145(b). The only issue before the jury was whether such an attempt had been made. The indictment charged and the Government's evidence showed that the attempt was made by filing returns which were false in two respects, *i.e.*, omitting income and listing false exemptions. Falsity in either respect would result in the evasion of taxes. The requirement of unanimity was therefore satisfied if each juror found, as the verdict indicates each juror did find, that the returns were false in either one or in both respects and filed with the intent to evade taxes. That this was the jury's conclusion is not questioned by the petitioner.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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